IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL WRIT PETITION NO.672 OF 2005

Mr. Sanjay Narhar Malshe)
aged 40 years, residing at)
A-302, Nath Plaza, Modi-Whana)
Solapur - 413 001.)...Petitioner

Versus

State of Maharashtra,)
(at the instance of Jail Road)
Police Station, Solapur))...Respondent

Mr.A.P.Mundargi with Mr.Prakash Naik for petitioner
Mr.B.H.Mehta, APP for State

CORAM : R.M.S.KHANDEPARKAR &
P.V.KAKADE, JJ.

DATE : 29TH MARCH, 2005.

ORAL JUDGMENT : (Per Khandeparkar, J.)

1. Heard. Rule. By consent the rule is made returnable forthwith.

2. A question of law, important and interesting which is sought to be raised in this Petition relates to the powers of the Judicial Magistrate in respect of the grant or refusal of the bail to accused persons in cases which are exclusively triable either by the Sessions Courts or Special Courts established under a special

statute.

3. Initially the Writ Petition was filed challenging the FIR being C.R. No.3014 of 2005 register at the Jail Road Police Station, Solapur. However, considering the fact that charge-sheet in the matter has already been filed by the Investigating Agency, reserving his right to dispute about the insufficiency of the materials to frame the charge against him, the Petitioner has restricted the challenge to the extent of the point which is sought to be raised as noted above.

4. Few facts relevant for the decision are that the services of one Rajendra Patil, who was the employee of the Petitioner's company came to be terminated on 20.11.2002. The Petitioner on or about 26.8.2004 lodged a complaint with the Commissioner of Police, Solapur against Shri Jawahar Chavan, Rajendra Patil and some others that he was being pressurised for re-employment of said Rajendra Patil and further that he was also being threatened in that regard. The police authorities arrested some people including Jawahar Chavan, Rajendra Patil pursuant to the said complaint. The complaint also came to be filed on 4.2.205 against Zopadpatti

Sanghatana, Solapur by the company of the Petitioner. Meanwhile, a complaint came to be filed on 26.8.2004 against the Petitioner accusing the Petitioner having used abusive language against one Smt.Nanda Bansode as well as the complainant Chandrakant Raut on 25.8.2004. Thereupon the Petitioner moved for an anticipatory bail, and by an Order dated 18.2.2005, the same was rejected by the learned Sessions Judge, Solapur. The Petitioner thereupon filed an anticipatory bail application being Criminal Application No.1417 of 2005 in this Court and the same was disposed of by an Order dated 4.3.2005 while reserving the right of the Petitioner to challenge the FIR. Consequently the present Petition has been filed. In the course of the hearing of the Petition it was revealed that the charge-sheet has already been filed. Thereupon by reserving the right to raise necessary objection before the concerned Court about insufficiency of the materials to frame the charge, the learned Advocate for the Petitioner has restricted the challenge in the Petition to the extent of the petitioner’s right to secure the bail even in the course of committal proceedings.

5. It is the submission of the learned Advocate for

the Petitioner that though the provisions of Scheduled Castes and Scheduled tribes (Prevention of Atrocities) Act, 1989, hereinafter called as "the said Act" under which the charge-sheet has been filed, specifically provide under Section 18 thereof that the provision of Section 438 of the Code is not applicable to the cases arising under the said Act, yet there is no bar under Section 209 of the Criminal Procedure Code or under any other provision of law including under the said Act for grant of bail to the person accused of offences punishable under Section 3 of the said Act while the matter is being committed to the Special Court. Referring to the decision of the Apex Court in **Gangula Ashok and Anr. vs. State of A.P. reported in (2000) 2 SCC 504** wherein it has been ruled that a Special Court under the said Act is not empowered to take cognizance directly of the offence committed under the said Act but it has to be only after committal of the case by the Magistrate in exercise of powers under Section 209 of the Code, it is submitted by the learned advocate that it is necessary for the Magistrate to commit the proceedings to Special Court in order to enable to Special Court to take cognizance of the said proceedings arising from the charge-sheet filed by the Police in

relation to the offence in question. It is further submitted that in the interregnum period there is absolutely no justification for detention of the petitioner, nor it has been the case of the Investigating Agency that such detention is necessary. Besides, there is no statutory provision debarring the Magistrate to refuse bail in the course of the committal proceedings. However, considering the normal practice followed by the Magistrate in committal proceedings, it is necessary for this Court to give direction to the Court of Magistrate to exercise their powers in relation to the grant of bail even in such cases including the one of the Petitioner. Reliance is also placed in that regard in the decision of Kerala High Court in **Shanu vs. State of Kerala reported in 2001(1) Crimes 292** as well as Allahabad High Court in the case of **Ram Bharoshi & Ors. vs. State of U.P. & Ors. reported in 2004(3) Crimes 651**. Drawing attention to Section 437 of the Criminal Procedure Code the learned Advocate for the Petitioner has further submitted that there is no bar for release of the accused person on bail by the Magistrate unless the person is accused of commission of the offence punishable with death or life imprisonment. The learned Advocate for the Petitioner has also

submitted that whenever the legislature has thought it fit to impose such bar on exercise of the powers of the Magistrate to grant the bail, invariably a specific provision is made in that regard in the statute. For example, attention is drawn to Section 36-A of the Narcotic Drugs and Psychotropic Substance Act, 1985, hereinafter called as "the NDPS Act."

6. The learned APP while fairly conceding that the provision of Section 437 of the Code does not bar the Magistrate to grant such bail, submitted that the question of grant or refusal of bail would depend upon the facts of each case and the magistrate has to exercise his discretion in that regard judiciously depending upon the facts of each case, and therefore, submitted that there cannot be any blanket direction as such for grant of such bail in each and every case.

7. Undoubtedly Section 18 of the said Act provides that nothing in section 438 of the code shall apply in relation to any case involving the arrest of any person on an accusation of having committed an offence under the said Act. Undoubtedly, therefore, the question of grant of anticipatory bail in case of persons accused of

commission of offence under the said Act does not arise at all. However, as rightly submitted by the learned Advocate for the Petitioner that the said Act nowhere debars the Magistrate from exercising the powers under Section 437 of the Code whenever facts of the case demand such an exercise of powers of the Magistrate under the said provision of the Code.

8. Section 437 of the Code deals with the subject of availability of bail in cases of non bailable offences. It specifically provides that when any person accused of, or suspected of, the commission of any non-bailable offence is arrested or detained without warrant by an officer in charge of a police station or appears or is brought before a Court other than the High Court or Court of Sessions, then such person may be released on bail, unless there appears reasonable ground for believing that such person is guilty of an offence punishable with death or imprisonment for life and/or such person had been previously convicted of an offence punishable with death, imprisonment for life or imprisonment for seven years or more, or he had been previously convicted on two or more occasions for a non-bailable and cognizable offence. At the same time

the first proviso to the said section provides that if the accused person happens to be of the age of less than 16 years or a women or is sick or infirm, then such a person can be released on bail. Even in some cases where person is accused of the commission of the offence punishable with death or imprisonment for life can also be released on bail if the court is satisfied that it is just and proper to grant such bail for any special reason. The third proviso to sub-Section 1 of Section 437 provides that the mere fact that an accused person may be required for being identified by the witnesses during the investigation shall not be sufficient ground for refusal of bail if he is otherwise entitled to be released on bail and gives an undertaking that he shall comply with such conditions as may be imposed by the court. Obviously, apart from the cases wherein the person is accused of commission of the offence punishable with death or imprisonment for life, the Court of Magistrate has wide power in the matter of grant or refusal of the bail to the accused person, of course, such power is to be exercised judiciously and the same should be apparent from the order passed by the Magistrate. Nevertheless the fact remains that there is no total prohibition against grant of bail merely

because a person is accused of commission of offence of serious nature. Besides, if we peruse Section 209 of the Code which deals with the committal proceedings, it is apparent that even in the course of the committal proceedings there is no bar imposed upon the powers of Magistrate in the matter of grant or refusal of bail. Clause (b) of Section 209 clearly provides that while dealing with the accused persons appearing and brought before the Magistrate having committed the matter as the same is triable exclusively by the Court of Sessions, while the Magistrate is enjoined to commit the proceedings to the Court of Sessions or the Special Court constituted under any special statute, the accused may be remanded to the custody until such committal proceedings are complete, subject to the provisions of the Code relating to the bail. In other words while the Magistrate is empowered to remand the accused to the custody until the conclusion of the committal proceedings, that is to say, till the proceedings are placed before the Court of Sessions or the Special Court, as the case may be, the powers of the Magistrate either to grant the bail if asked for or to refuse the same are not restricted in any manner. On the contrary provision of Section 209 make it very clear that the

Magistrate while dealing with the committal proceedings is fully empowered either to grant or refuse the bail depending upon the facts of the case, albeit he has to exercise the discretion judiciously in that regard as rightly submitted by the learned APP.

9. The learned advocate for the Petitioner is also justified in contending that whenever the Legislature has thought it fit to provide any embargo over the power of the Magistrate in the matter of grant of bail to the accused person, the legislature has made necessary provision in that regard and one such example is Section 36-A in the NDPS Act. Section 36-A(1)(b) of NDPS Act clearly provides that notwithstanding anything contained in the Code of Criminal Procedure where a person accused of or suspected of the commission of offence under the NDPS Act is forwarded to a Magistrate under sub-section (2) or sub-section (2-A) of Section 167 of the Code of Criminal Procedure, 1973, such Magistrate may authorise the remand of such person to such custody as he thinks fit for a period not exceeding fifteen days in the whole where such Magistrate is a Judicial Magistrate and seven days in the whole where such Magistrate is an Executive Magistrate provided that in cases which are triable by

the Special Magistrate where such Magistrate considers - when such person is forwarded to him as aforesaid, or upon or at any time before the expiry of the period of detention authorised by him, that the remand of such person to the custody is unnecessary, he shall order such person to be forwarded to the Special Court having jurisdiction. This apparently discloses that the Magistrate in case of the persons accused of commission of the offence under NDPS Act and in cases which are triable by the Sessions Court even if he considers the remand of such person to the custody to be unnecessary, he cannot grant the bail, but he will have to direct the person to be forwarded to the Sessions Court having jurisdiction. That is not the case in relation to a person accused of commission of offence under the said Act. There is no provision in the said Act in pari materia to Section 36-A of the NDPS Act. The said Act also does not provide any embargo over the powers of the Magistrate to grant bail. Considering the same merely because the offence under the said Act is exclusively triable by the Special Court in terms of the provision of Section 14 of the said Act, it cannot be said that the Magistrate will have no power to grant the bail. In our considered opinion, therefore, taking into

consideration all the provisions of the said Act as well as the provisions of the Code of Criminal Procedure, it is apparent that the Magistrate has power to grant the bail even at the time of committal proceedings, if the facts of the case do not justify remanding of such person to the custody. The exclusive jurisdiction of the Special Court to try the offence that by itself could not be criteria to decide about the absence of the powers to the Magistrate to grant bail in case of offences under the said Act. Unless the special statute which gives exclusive jurisdiction to the Special Court for the trial of the offences thereunder makes a specific provision like in the nature of Section 36-A of the NDPS Act or on similar lines, specifically excluding the powers of the Magistrate to grant the bail to the persons accused of commission of such offence, there cannot be any restriction on the powers of the Magistrate to grant the bail, merely because the person is accused of the offence punishable under the said Act, unless, of course, the offence is punishable with death or life imprisonment.

10. We are fortified in the above view by the decision of the Kerala High Court and the Allahabad High

Court which are relied upon by the learned advocate for the Petitioner. In fact the decision of the Kerala High Court is directly in relation to the offence under the said Act. In the case of **Shanu** (supra) the learned Single Judge of the Kerala High Court after taking note of the provision of the said Act as well as Section 437 of Code held that "it is clear that the J.F.C.M.'s Court has got jurisdiction to grant bail to the persons accused of the offence punishable under any of the sub-cls.(i) to (xv) of sub-s. (1) of S.3 of the Act." While delivering the said decision the learned Single Judge after taking note of Section 437 of Criminal Procedure Code has observed that "the Magistrate is competent to release an accused, either appeared or brought before him, if the offence alleged is not punishable with death or imprisonment for life." Similarly in **Ram Bharoshi**'s case (supra) the learned Single Judge of Allahabad High Court held that " it is abundantly clear that there is no prohibition on a Magistrate to grant bail in a Sessions triable case, unless it is punishable with death or imprisonment for life, and it is absolutely necessary that the Magistrate give up the erroneous practice of refusing to consider or grant bails in such cases where there is no

prohibition under the Code of Criminal Procedure." While delivering the said Judgment it was observed thus -

> "13. There are a number of offences in the Penal code which are not punishable with death or imprisonment for life, but they are triable by the Court of Sessions, where the Magistrates invariably refuse bail, because they entertain a wrong notion that they are disentitled to grant bails in such cases, even if the case is one where bail ought to have been granted on merits. this approach is also in the teeth of a Division Bench decision of this Court, Vijay Kumar and ors. v. State of U.P. and other.
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> 14. The result of this unhealthy practice is that a person against whom an FIR is lodged relating to any Sessions triable offence, which on a plain reading appears to be a case of false or malicious prosecution, uncorroborated by any independent material, the accused is left at the mercy of the police, in whose favour the Magistrate has virtually abdicated his jurisdiction. An accused may have to remain in

> jail for some time before his bail application is heard and granted by the Sessions Court, after the Magistrate’s routine rejection of his prayer for bail even in those minor Sessions triable offences where there may be no need for taking an accused in custody for the purpose of investigation, or where palpably he appears to have been implicated falsely,and there are no other attendant circumstances disentitling the accused from an order of bail. A sting in jail can be a source of great humiliation for a maliciously prosecuted accused who enjoys some social status."

We are in respectful agreement with the view expressed by the learned Single Judges of the Kerala High Court as well as Allahabad High Court in the above referred judgments.

11. Liberty to the Petitioner to raise the point regarding insufficiency of the materials to frame the charge before the concerned court, as it is too premature for this Court to express any opinion in that

regard, and the issue in that regard can be very well raised before the concerned court after committal of the proceedings. We make it clear that we have not expressed any opinion on this point.

12. For the reasons stated above, therefore, the petition partly succeeds. Meanwhile the Magistrate while committing the proceedings consequent to the filing of the charge-sheet is expected to exercise his discretion judiciously in relation to power to grant or refuse the bail to the petitioner in case an application for bail is filed by the petitioner and to pass an appropriate order in that regard in accordance with the provisions of law bearing in mind the observations made herein above on the point of jurisdiction of the Magistrate to entertain and decide such bail application.

13. In view of the filing of the charge-sheet the Petitioner has to appear before the concerned Magistrate within ten days whereupon the Magistrate will have to pass an appropriate order as stated above. Meanwhile the interim relief granted to the Petitioner to continue till the appropriate order is passed by the Magistrate.

14. Rule is made absolute in above terms with no order as to costs.

15. Certified copy expedited.

(R.M.S.Khandeparkar,J.)

(P.V.Kakade,J.)

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